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CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
95814

November 16, 1998

Mr. Bruce Halstead
U.S. Fish and Wildlife Service
1125 16th Street
Arcata, CA 95221

RE: Comments on Applications for Permits for Incidental Take of Threatened and Endangered Species and Associated Draft Habitat Conservation Plan for Properties of the Pacific Lumber Company, the Scotia Pacific Lumber Company, and Salmon Creek Lumber Company

Dear Mr. Halstead:

We are writing to you to submit our official comments on the proposed Habitat Conservation Plan (hereafter the "HCP") for the properties of the Pacific Lumber Company, the Scotia Pacific Lumber Company, and the Salmon Creek Lumber Company (hereafter "the company" or "PALCO").

Before providing our specific comments on the HCP, and given the unique and direct involvement of the California Legislature in the oversight and conditioning of the expenditure of state funds for the acquisition of the Headwaters Forest on improvements to this HCP, we believe it to be necessary to set forth our views concerning the circumstances under which this HCP has been prepared, its nexus with the actions taken by the California Legislature this past year in enacting AB 1986 (Migden), and its nexus with those actions which will be taken early next year by the California Wildlife Conservation Board (hereafter WCB) in furtherance of the acquisition the Headwaters Forest Preserve.

As you agency is aware, this HCP is unique, and may well be unprecedented in the history of the federal Endangered Species Act, in the circumstances under which it was undertaken. The obligation of the company to prepare the HCP was first outlined in a September 28, 1996 "agreement" entered into by representatives of the federal Department of the Interior, the California Resources Agency, the company (and its holding company, MAXXAM Corporation), Senator Dianne Feinstein and Congressman Frank Riggs. That agreement also outlined various obligations of the company to set aside the Headwaters and specified surrounding forests and to

sell those forests to the federal and state governments to hold and preserve in public ownership. Thus, from the outset, the public acquisition of the Headwaters Forest Preserve was inextricably linked to the preparation, and contents, of this HCP.

In addition, on February 27, 1998, representatives of the of the Fish and Wildlife Service, the National Marine Fisheries Service, the California Resources Agency, and the company (and its holding company, the MAXXAM Corp.) signed a "Pre-Permit Application Agreement in Principle" (hereafter PPA) which set forth more specifically the contents and requirements of the HCP. That document, in turn, cross-referenced several other documents prepared by the federal and state governments in consultation and negotiation with the company, including an interagency proposal which set forth requirements for the protection of aquatic species commonly referred to as the "January 7, 1998 Aquatics Addendum." These documents are particularly relevant insofar as they are explicitly referenced by, and used as the basis for many of the improvements to, the HCP in AB 1986.

As noted above, the California Legislature has had a direct and ongoing interest in the Headwaters Forest acquisition and its linkage to the preparation, adoption, and enforcement of this HCP. Indeed, in early 1997, the California Senate established the Senate Task Force on the Acquisition of the Headwaters Forest. Later in 1997, the Legislature passed Senate Concurrent Resolution 18, which established the Joint Senate-Assembly Committee on Acquisition of the Headwaters Forest. These special committees conducted a number of detailed oversight hearings on the acquisition and the HCP during 1997 and 1998.

The California Legislature's most significant and direct involvement in the Headwaters Forest acquisition and in the HCP is embodied in the provisions of AB 1986. While that legislation recognizes that the adoption of the HCP is strictly a matter of federal law, it nonetheless separately establishes under California law those conditions under which state taxpayer funds for the acquisition of the Headwaters Forest may be spent. These conditions are binding upon the WCB; AB 1986 prohibits the expenditure of state funds unless

In large measure, those conditions relate to explicit improvements to the HCP which must be made in order for the WCB to be authorized to expend state funds for the Headwaters Forest acquisition. Therefore, while the provisions of the final HCP are, and will remain, within the exclusive domain of federal law, California's share of the funding for acquisition of the Headwaters is, and will remain, contingent upon amendments to the final HCP as described in AB 1986. Stated more simply, the acquisition of the Headwaters Forest cannot occur unless the conditions set forth in AB 1986 are met.

In addition to noting the fundamental interdependence of the HCP and the Headwaters Forest acquisition, we believe it is both relevant and critical to note for the record the company's utter failure to abide by state Forest Practices law and regulations, and, in our view, the federal and state Endangered Species Acts.

This failure has resulted in the suspension of the company's timber operator's license through the end of the year. In our view, the past actions by this company in violation of law make it all the more essential that the provisions of the HCP, as enhanced by the provisions of AB 1986, be

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made enforceable through mechanisms which may not be skirted or abused by the company, and that compliance with the final HCP be closely monitored by the state and federal agencies.

Specifically, we would suggest that the final HCP incorporate mechanisms such as the posting of a performance bond or surety bond by the company in an amount equivalent to the value of the timber being harvested in order to ensure compliance with the HCP. Moreover, in our view, the final HCP should explicitly provide that state and federal personnel be maintained on-site at all company timber operations, at company expense, in order to inspect and enforce the provisions of the HCP and of AB 1986.

Finally, we wish to note that the company has apparently chosen not to amend its draft HCP to incorporate the conditions required by AB 1986 during the public comment period. While we understand that this failure to act may have come about in order to avoid causing additional delays due to recirculation and public comment requirements under the National Environmental Policy Act, we nonetheless wish to note for the record our strong objection to any effort by the company or the federal agencies, once again, to commence last-minute, closed door negotiations over amendments to the HCP in a manner similar to that in which the draft HCP was written this past summer.

The description of the amendments to the HCP contained in these comments represent the minimum improvements which need to be made to the HCP in order for it to pass muster before the WCB and to permit the expenditure of state funds for the Headwaters Forest acquisition, and should not be subject to further revision or negotiation. Obviously, as noted in AB 1986, we would strongly encourage the federal agencies to impose those conditions which are more protective of aquatic and avian species than the provisions of the legislation which the agencies believe are necessary to comply with the federal Endangered Species Act.

Our specific comments on the draft HCP in order to ensure that it meets the minimum requirements of AB 1986 are as follows:

RIPARIAN MANAGEMENT STRATEGY

Class I Fish Bearing Streams:

- 100 foot no-cut buffers on each side of streams must be established until watershed assessment is completed and federal scientists have determined final watershed prescriptions.

Draft HCP establishes 30 foot "restricted harvest band", within which some harvesting can take place upon concurrence of company and federal agencies. These provisions must be deleted or modified to reflect changes made by AB 1986.

- After watershed assessment is completed, final site-specific watershed prescriptions must be determined exclusively by federal scientists.

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Draft HCP allows PALCO to veto more stringent watershed prescriptions which come out of watershed assessment. These provisions must be deleted from draft HCP.

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- Additional protections must be imposed on timber harvesting on steep slopes (slopes of greater than 50%). These protections must extend out Riparian Management Zone (RMZ) beyond 170' to break in slope or to distance determined by mass wasting team, and prohibit timber harvesting within RMZ unless approved by state and federal agencies. (This provision could result in significant expansion of no-cut buffers, depending upon location of watershed and upon site-specific findings of mass wasting team (i.e. geologist, forester, and NMFS, FWS, DFG, CDF, or RWQCB). In addition AB 1986 expressly requires that requirements emanating from this provision be incorporated into THP's).

Draft HCP does not contain provision, and therefore explicit provisions must be added to final HCP.

- Additional protections must be incorporated for preservation of larger trees in Outer Entry Band (100' - 170'). Requirements include mandatory permanent marking (and prohibition against cutting) of larger, older trees (> 40" diameter), and a prohibition on timber harvesting if specific tree sizes are not present in band. (This should result in significant expansion of no-cut buffer in some areas.)

Draft HCP does not contain provision, and therefore explicit provisions must be added to final HCP.

Class II Non-Fish Bearing Streams:

- 30-foot no-cut buffers on each side of streams must be established until watershed assessment is completed and federal scientists have determined final watershed prescriptions.

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Draft HCP establishes 10 foot "restricted harvest band", within which some harvesting can take place upon concurrence of company and federal agencies. These provisions must be deleted and replaced by the ones described above.

- After watershed assessment is completed, final site-specific watershed prescriptions must be determined exclusively by federal scientists.

Draft HCP allows PALCO to veto more stringent watershed prescriptions which come out of watershed assessment. These provisions must be deleted in final HCP and replaced with provisions described above.

- Additional protections must be imposed on timber harvesting on steep slopes (slopes of greater than 50%). These protections must extend out Riparian Management Zone (RMZ) beyond 170' to break in slope or to distance determined by mass wasting team, and prohibit

timber harvesting within RMZ unless approved by state and federal agencies. (This provision could result in significant expansion of no-cut buffers, depending upon location of watershed and upon site-specific findings of mass wasting team (i.e. geologist, forester, and NMFS, FWS, DFG, CDF, or RWQCB). New provision must expressly require that requirements emanating from this provision be incorporated into THP's).

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Draft HCP does not contain provision. Final HCP must be amended to explicitly contain these provisions.

- Additional protections for preservation of larger trees are required in Selective Entry Band (now 30' - 100'). Requirements include mandatory permanent marking (and prohibition against cutting) of larger, older trees (> 40" diameter), and a prohibition on timber harvesting if specific tree sizes are not present in band. (This could result in significant expansion of no-cut buffer in some areas.)

Draft HCP does not contain provision and must be explicitly amended to contain these provisions.

- Final maximum no-cut buffer on streams, upon completion of watershed assessment, may be up to 170' as determined by federal scientists. Final minimum no-cut buffers may be 30' unless federal agencies/federal scientists determine that smaller buffer will benefit aquatic habitat or species, in which case it may be reduced to 10'.

Draft HCP establishes maximum no-cut buffer, upon completion of watershed analysis, at 130', and minimum buffer at 10 feet. These provisions must be deleted and replaced with the provisions described above.

ROAD MANAGEMENT STRATEGY

- Road-related conditions, on balance, must be as stringent as provisions in February 27, 1998 Pre-permit Application Agreement in Principle (PPA).

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- The PPA (provision (1)(vii)) requires the following:

vii. Prior to the issuance of an ITP [incidental take permit] road storm proofing will be implemented with watersheds as indicated by the results of the DNR process, but PL agrees to conduct road storm proofing of at least 50 miles per year until the ITP is issued. Further PL will ensure that all new roads and landings related to THP's [timber harvest plans] comply with the specifications contained in the Handbook for Forest and Ranch Roads (Weaver 1994) and that any new roads are constructed according to the prescriptions contained in the January 7, interagency proposals (1/7 aquatics addendum) [emphasis added].

viii. Subsequent to the issuance of the ITP, the roads will be managed and monitored according to the ITP and approved HCP.

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- The 1/7 Aquatics Addendum has extensive provisions governing both use, and stormproofing, of existing roads and construction of new roads. Excerpts are provided below:

Construction of new roads new roads and landings shall comply, at a minimum, with specifications described in Handbook for Forest and Ranch Roads (Weaver 1994) including but not limited to the following:

-- Roads shall be constructed as single-lane with periodic turnouts (road width generally 12 to 14 feet).

-- Roads shall be constructed primarily on slopes under 50%.

-- Roads shall be located outside riparian management zones, except for RMZ crossings, which shall be minimized. [Emphasis added]

-- Roads shall be constructed by outsloping, or maintained with rolling dips (or ditched roads maintained by well-spaced ditch relief system)

-- Avoid construction of roads in high risk situations (e.g., inner gorges, road alignments crossing unstable terrain, alignments crossing slopes greater than 50 percent, or degraded watersheds) unless potential roads and specifications are evaluated by a Certified Engineering Geologist (CEG) and submitted to the agencies with the THP for review in advance of THP pre-harvest inspection. [Emphasis added]

-- No road or landing construction or reconstruction during the winter period or any other time of the year during any of the following conditions:

a. During periods of measurable rainfall

b. Following any rainfall of one-quarter inch or greater, there shall be a minimum of 48 hours of no measurable rainfall prior to resumption of work activities. [emphasis added]

-- Landowner shall be responsible for all road construction and maintenance

Draft HCP allows roads to be constructed within RMZ's unless "feasible alternatives that would have less environmental impact are clearly not available as determined through consultation with the appropriate agencies."

Draft HCP allows construction of roads during winter months or rainy periods provided it complies with "applicable state and federal laws" and provided "consultation" with state and federal agencies has taken place.

These provisions must be deleted and replaced with those described above.

MASS WASTING/EROSION STRATEGY

- In areas of extreme, very high, and high landslide hazard, including inner gorges, timber harvesting, and construction of new roads, is prohibited unless scientific team consisting of geologist, forester, and state or federal environmental agencies determines alternative prescriptions may be used. In the case of unresolved disagreement among team, state Division of Mines and Geology makes final determination taking into account concerns of team members.
- Draft HCP does not contain provisions and must be amended to incorporate explicitly these requirements.
- 50,270 acres of company lands where "no data" exists on mass wasting hazards must be accounted for in hazard rating prior to approval of final HCP.

Draft HCP does not contain provisions and must be explicitly amended to incorporate these provisions

CONSISTENCY OF STATE TIMBER HARVEST PLANS WITH HCP

- Final HCP shall require that all timber harvest plans (THP's) be submitted at least 30 days before state approval/disapproval to federal agencies for review and for a finding as to whether or not plans are consistent with the final HCP.

Draft HCP does not contain provision and must be amended to incorporate these provisions.

- All sustained yield plans and timber harvest plans (THP's) must be consistent with final HCP as modified by legislation.

State law, sustained yield plan do not contain provision.

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PROTECTION OF "LESSER CATHEDRALS"

- Final HCP shall prohibit timber harvesting, including salvage logging and other activities detrimental to marbled murrelet in Marbled Murrelet Conservation Areas (MMCA's) enumerated in the bill for life of incidental take permits, as defined in February 27, 1998 Pre-permit application agreement in principle (PPA) (i.e. 50 years). PPA provision (1)(A)(i) states: "The term of the ITP applied for and the HCP will be 50 years."

Draft HCP establishes protections "for the life of the [incidental take] permit." HCP must be amended to explicitly provide 50-year protection for "lesser cathedrals."

- Final HCP shall establish acreages of MMCA's as delineated in bill (taken from PPA) and allows acreages to be adjusted by federal scientists to more accurately describe marbled murrelet habitat, provided that, in no event, may the acreages be less than those contained in draft HCP.

Draft HCP generally specifies smaller acreages for MMCA's, and must be amended to reflect larger acreages.

- Final HCP shall protect "Owl Creek" MMCA for 50 years. In addition, up to \$80 million appropriated for the public acquisition of "Owl Creek" Tract. The tract would be held in public ownership and protected in perpetuity.

Draft HCP allows Owl Creek to be logged upon approval of final HCP, subject to conditions in HCP and state forest practices law. Final HCP must be amended to reflect these provisions.

- Final HCP shall protect "Grizzley Creek" MMCA for five years from adoption of final HCP in order to provide opportunity to purchase tract. In addition, up to \$20 million is appropriated for public acquisition of tract. The tract would be held in public ownership and protected in perpetuity.

Draft HCP gives PALCO option to log Grizzley Creek MMCA if it preserves Owl Creek MMCA or vice versa. If PALCO chooses to protect Grizzley Creek, protection is for the life of the incidental take permit. Final HCP must be amended to reflect these provisions.

Our final comment relates to the Implementation Agreement which is not a formal part of the HCP but nonetheless accompanies the draft HCP. We wish to note that the provisions of AB 1986 are state law and are not subject to the various processes for arbitration and negotiation delineated in the Implementation Agreement. Therefore, any and all conditions specified under AB 1986 must be made enforceable as a matter of law in order for the funds for acquisition of the Headwaters Forest Preserve to be made available. We would suggest that a provision be

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added to the final HCP which makes clear that the provisions of the Implementation Agreement do not apply to any of the conditions established under the state legislation.

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Thank you, in advance, for your consideration and for the incorporation of these comments into the public record on the draft HCP. We urge the agency to incorporate into the final HCP the proposed changes enumerated above.

Sincerely,



JOHN BURTON

President pro Tem of the Senate



BYRON D. SHER

Senator, 11th District